

DEPARTMENT OF STATE REVENUE

REVENUE RULING #2002-08ST

May 8, 2002

Notice: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by publication of a new document in the Indiana Register. The publication of this document will provide the general public with the information about the Department's official position concerning a specific issue.

ISSUES

Sales/Use Tax – Merchant Power Plant and Wholesale Sales of Electricity

Authority: IC 6-2.5-5-10, IC 6-2.5-4-5, Rule 45 IAC 2.2-4-11

The taxpayer requests the Department to rule on the application of sales/use tax to a merchant power plant and to the wholesale sales of electricity. The taxpayer specifically requests the following issues be addressed:

1. Whether or not the taxpayer's purchase, storage, use or consumption of all items that would be treated as production plant or power production expenses should be exempted from the Indiana gross retail tax, including without limitation:
 - (a) all power generation equipment, such as turbines and generators; and
 - (b) consumables, such as natural gas and fuel oil, including such items purchased from an affiliate;
2. Whether or not the wholesale sales of electricity to public utilities or affiliated companies should be subject to Indiana gross retail tax; and
3. Whether or not the resale of electricity by any affiliates of the taxpayer into the wholesale market should be subject to Indiana gross retail tax.

STATEMENT OF FACTS

The taxpayer, a limited liability company authorized to do business in Indiana, is currently acting in its capacity as construction agent in the development of an electricity generating facility (the "Project") in Indiana. The Project will be a merchant power plant dedicated to the generation of electricity and subsequent sale of such electricity at wholesale. The taxpayer will submit an application to the Federal Energy Regulatory Commission ("FERC") for a determination that it will be an Exempt Wholesale Generator ("EWG"). As an EWG, electricity from the Project will be only sold at

wholesale. Additionally, the IURC determined that the taxpayer is a public utility under Indiana law and declined to exercise its jurisdiction over the taxpayer provided that certain ongoing requirements are met.

The Project consists of two phases. The first phase is the construction of 542 MN combined-cycle generating facility. The second phase is the construction of two 44 MW simple-cycle combustion turbines. All of the electricity produced from this facility will be sold either to other public utilities in the wholesale market, or to an affiliate of the taxpayer for resale into the wholesale market. The affiliate of the taxpayer will not make sales of electricity at retail.

ISSUE #1 – DISCUSSION

1. Whether or not the taxpayer's purchase, storage, use or consumption of all items that would be treated as production plant or power production expenses should be exempted from the Indiana gross retail tax, including without limitation:
 - a. all power generation equipment, such as turbines and generators; and
 - b. consumables, such as natural gas and fuel oil, including such items purchased from an affiliate.

IC 6-2.5-5-10 states:

Transactions involving tangible personal property are exempt from the state gross retail tax, if:

- (1) the property is classified as production plant or power production expenses, according to the uniform system of accounts which was adopted and prescribed for the utility by the Indiana utility regulatory commission; and
- (2) the person acquiring the property is:
 - (A) a public utility that furnishes or sells electric energy, steam, or steam heat in a retail transaction described in IC 6-2.5-4-5. . .

IC 6-2.5-4-5 states:

- (b) A . . . person engaged as a public utility is a retail merchant making a retail transaction when the . . . person furnishes or sells electrical energy, natural or artificial gas, water, steam, or steam heating service to a person for commercial or domestic consumption.

Regulation 45 IAC 2.2-4-11 defines a public utility for sales tax purposes as follows:

- (c) the term "public utilities" as used in this regulation [45 IAC 2.2] means any organization which is engaged in the furnishing or selling of electricity . . .

and having the right of eminent domain or subject to government regulation in connection with the furnishing of public utility services. . .

The taxpayer has obtained an order from the IURC declaring it a public utility for Indiana regulatory purposes. Additionally, the taxpayer will file with, and expects to obtain an Order from, the FERC indicating that the taxpayer qualifies as an EWG. The taxpayer, therefore, is a “public utility” for purposes of both IC 6-2.5-4-5 and IC 6-2.5-5-10, and within the meaning of 45 IAC 2.2-4-11. As a “public utility” all of taxpayer’s machinery, equipment and other tangible personal property that is treated as production plant or power production expenses according to the Uniform System of Accounts for electric utilities is exempt from Indiana sales/use tax.

ISSUE #1 – RULING

The taxpayer’s purchase, storage, use or consumption of items that are treated as production plant or power production expenses according to the Uniform System of Accounts for electric utilities will be exempt from Indiana sales/use tax, including without limitation:

- a. all power generation equipment, such as turbines and generators; and
- b. consumables, such as natural gas and fuel oil, including such items purchased from an affiliate.

ISSUE #2 – DISCUSSION

2. Whether or not the wholesale sales of electricity to public utilities or affiliated companies should be subject to Indiana gross retail tax.

IC 6-2.5-4-5(b) provides that sales of electrical energy by a public utility constitute retail transactions subject to sales tax; however, IC 6-2.5-4-5(c)(2) exempts sales to “another public utility”.

(c) Notwithstanding subsection (b), a . . . person engaged as a public utility is not a retail merchant making a retail transaction when:

. . .

- (2) The . . . person sells the services or commodities listed in subsection (b) to another public utility or power subsidiary . . . ;

For the purpose of imposition of sales/use tax under IC 6-2.5-4-5(c) the Department has determined that “a person engaged as public utility” includes anyone selling utility services. The “sales for resale” (wholesale sales) by the taxpayer, therefore, are exempt from Indiana sales/use tax as the purchasers of electricity, also, meet the definition of “public utility”.

ISSUE #2 – RULING

The taxpayer's wholesale sales of electricity will not be subject to Indiana sales/use tax.

ISSUE #3 – DISCUSSION

3. Whether or not the resale of electricity by any affiliates of the taxpayer into the wholesale market should be subject to Indiana gross retail tax.

As discussed in above "Issue #2", the Department has determined that for the purpose of the imposition of sales/use tax under IC 6-2.5-4-5(c) "a person engaged as a public utility" includes anyone selling utility services. Here the taxpayer's affiliate and the purchasers of the electricity sold by the taxpayer's affiliate are "public utilities", hence, the sales of electricity by the taxpayer's affiliate will not be subject to Indiana sales/use tax.

ISSUE #3 - RULING

The wholesale sales of electricity by the taxpayer's affiliate will not be subject to Indiana sales/use tax.

CAVEAT

This ruling is issued to the taxpayer requesting it on the assumption that the taxpayer's facts and circumstances, as stated herein, are correct. If the facts and circumstances given are not correct, or if they change, then the taxpayer requesting this ruling may not rely on it. However, other taxpayers with substantially identical factual situations may rely on this ruling for informational purposes in preparing returns and making tax decisions. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material respect from the facts and circumstances given in this ruling, then the ruling will not afford the taxpayer any protection. It should be noted that subsequent to the publication of this ruling, changes in statute, a regulation, or case law could void the ruling. If this occurs, the ruling will not afford the taxpayer any protection.

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